SERVED: May 27, 1994

NTSB Order No. EA-4170

UNITED STATES OF AMERICA NATIONAL TRANSPORTATION SAFETY BOARD WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD at its office in Washington, D.C. on the 12th day of May, 1994

DAVID R. HINSON Administrator, Federal Aviation Administration,

Complainant,

v.

RICHARD BROSS THOMPSON,

Respondent.

Docket SE-11889

OPINION AND ORDER

The Administrator has appealed from the initial decision of Administrative Law Judge William E. Fowler, Jr., issued on August 5, 1991, dismissing an order of the Administrator revoking all respondent's airman certificates. For the reasons that follow, we deny the Administrator's appeal.

¹The initial decision is attached.

²The Administrator's order alleged violations of sections 61.18 and 61.37 of the Federal Aviation Regulations. 14 CFR Part 61.

This proceeding arises out of an investigation into allegations of widespread cheating on pilot qualification exams at Homestead Air Force Base in 1987. The investigation led to criminal proceedings before a grand jury against the principal participants and to a variety of lesser administrative actions against other pilots, including respondent, whose involvement was not so extensive and who cooperated in the investigation.

By his own admission, respondent in May and June 1987 took
ATP and flight engineer examinations in which answers to the exam
questions were made available and used by him.³ The testing
improprieties were known to FAA almost immediately. When it
first learned of the possibility that he was among those who
might have taken tainted exams, FAA notified respondent that the
results of his June 1st flight engineer exam (alone) were null
and void and that retesting was required.⁴ Respondent retook the
exam in August 1987, and passed with a perfect score.

As the FAA investigation proceeded, respondent's commanding officer was notified of the problem and the need to interview officers under his command. According to the commander's affidavit, the FAA investigator indicated that the FAA was not interested in proceeding against those examined who cooperated in the investigation, as the investigation was targeted against FAA-

³Respondent compounded this offense by signing in July 1987, a statement to the effect that the examinations were taken under prescribed conditions and that no irregularities occurred. No separate charge related to this conduct was alleged.

⁴Respondent Ex. A, letter from Miami Flight Standards District Office, June 29, 1987.

designated examiners and others involved in organizing the scheme.⁵ These assurances were passed along to the command and all officers were encouraged to cooperate, according to the commander.

On October 8, 1987, respondent was informed that his retesting (more accurately, the processing of the results of his retesting) would be held in abeyance pending the outcome of a criminal investigation that the FAA had commenced; he was advised to contact one of the Special Agents in charge of the investigation as soon as possible. Six days later, on October 14, respondent gave a written statement to a Special Agent admitting his involvement. He testified before the grand jury several months later, for which testimony he was given testimonial immunity limited to criminal matters. From all that appears on this record, respondent, who aspired to a career in civil aviation, cooperated fully.

In May 1988, he was given a letter from the FAA indicating that the agency was "pleased to announce that all restrictions had been lifted" and that the records center would be so advised, "which will allow you to proceed with your certification and career." The letter was signed by the same FAA officer who had initiated the investigation against respondent, and who had

⁵Respondent Ex. EE, Affidavit of General David R. Smith.

⁶Respondent Ex. C, letter from Miami Flight Standards District Office, Oct. 8, 1987.

 $^{^{7}\}text{Respondent Ex. E, letter from Miami Flight Standard District Office, May 19, 1988.}$

informed respondent the previous October that his retesting was being held up pending the outcome of the investigation.⁸

Respondent, having earlier left active duty and now believing the episode was behind him, subsequently accepted a flying position with a regional air carrier and moved his family to his new place of employment. However, in December 1988, some 18 months after the FAA learned of the suspected cheating and some seven months after being told that he could move forward with his aviation career, respondent received a Notice of Proposed Certificate Action seeking the revocation of his pilot certificates. 9 The order of revocation was issued and the matter appealed to us. It was disposed of below on respondent's motion that the complaint in the case should be dismissed as stale. While we do not agree with the law judge's specific rationale for granting the stale complaint motion, based as it is on what we believe to be an unconvincing and potentially unwise excursion into political motivations and the preferably confidential content of settlement negotiations, 10 we concur in the view that

⁸An affidavit from this officer indicates that the letter releasing respondent's test results was provided because the results had been delayed for a substantial amount of time and the criminal investigation was not yet complete.

⁹About a year later, the FAA entered into negotiations with respondent and several similarly situated airmen, offering settlement in exchange for testimony at an upcoming administrative hearing against one of the principal participants. The record before us does not reveal whether respondent ever testified at any collateral hearings or trials, or why settlement negotiations with him were broken off after a year-long effort failed to produce an accord.

¹⁰In reaching his result, the law judge made much of the

the complaint was stale and properly dismissed under our Rule 33, $49 \ \text{CFR Part } 821.^{11}$

There is no doubt that respondent cheated on two written certification exams, and that the Administrator and this Board have long considered such condemnable conduct to be among the serious offenses that draw in question the care, judgment, and responsibility of a certificate holder. See, e.g., Administrator v. Gilley, NTSB Order EA-3303 (1991). Consequently, the

(...continued)

settlement agreement the Administrator had proposed but respondent had rejected. That agreement included language to the effect that the respondent had demonstrated "good moral character" in cooperating with the investigation. The law judge reasoned that, having been willing to state in the settlement agreement that respondent had demonstrated good moral character, the Administrator could not now pursue revocation based on an alleged lack of character necessary to qualify for a certificate. To reach his result, the judge admitted the content of the settlement negotiations between respondent and FAA into the record, despite established policy that settlement negotiations should not be disclosed in a proceeding on the merits.

¹¹49 C.F.R. § 821.33 provides, in pertinent part, as follows:

§ 821.33 Motion to dismiss stale complaint.

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for proposed action under section 609 of the Act, respondent may move to dismiss such allegations pursuant to the following provisions:

- (a) In those cases where a complaint does not allege lack of qualification of the certificate holder:
- (1) The Administrator shall be required to show by answer filed within 15 days of service of the motion that good cause existed for the delay, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.
- (2) If the Administrator does not establish good cause for the delay or for imposition of a sanction notwithstanding the delay, the law judge shall dismiss the stale allegations and proceed to adjudicate only the remaining portion, if any, of the complaint.

Administrator's complaint, at least facially, presented an issue of lack of qualifications that ordinarily would be fatal to a stale complaint motion. We find that such a result cannot be upheld in the circumstances of this case.

As noted, <u>supra</u>, the FAA, following a lengthy period during which respondent appears to have fully cooperated in efforts to prosecute those accountable for the exam cheating scheme, essentially advised respondent, in a letter from Charles Smith of the Miami Flight Standards Office, that his case was closed. Specifically, the letter, quoted briefly earlier, stated, in its entirety:

This letter is offered to provide you with a current update on the circumstances and conditions that effect [sic] your situation relative to the F.A.A. written examination referred to in my original letter of June 29, 1987.

I am pleased to announce that, upon receipt of this letter, all restrictions placed on your retaking ANY written examination have been lifted. The records center of the FAA in Oklahoma City will be so advised which will allow you to proceed with your certification and your career.

Accept our apologies for the extended delay and inconvenience. 12

Although the FAA maintains that the purpose of this letter was not to terminate the investigation, but simply to allow respondent to retest pending completion of the investigation, a position we find extremely tenuous, 13 the FAA's actual intent in

¹²Respondent Ex. E, supra.

¹³The Administrator contends that the letter should be so construed because completion of retesting was delayed, and there was "no useable evidence as yet available" to prevent the airman

sending the letter is not especially relevant to our conclusion that dismissal for staleness is appropriate. ¹⁴ That conclusion is dictated by our assessment that the Administrator would not send such a letter to an airman he did not believe was qualified to hold a certificate.

An allegation of cheating, as noted above, has traditionally been deemed to present an issue of qualifications that would preclude the grant of a stale complaint motion. This does not mean, however, that the Administrator must seek revocation, or allege a lack of qualification, in every case in which cheating is suspected. Rather, it means that such an offense raises a presumption about qualifications derived not from the character of the supposed offender, but from the nature of the prohibited

The contention is difficult, if not impossible, to reconcile with the Administrator's prior insistence to the effect that respondent's earlier, inculpatory admissions had not been rendered unusable by their involvement in grand jury proceedings in the criminal inquiry that had been initiated. Moreover, neither the tone nor the content of the letter supports the notion that it was an interim measure taken because an end to an investigation was not in gight. In other words, there was applean

from taking these tests. Opposition Motion to Dismiss, at 8.

(...continued)

investigation was not in sight. In other words, there was ample useable evidence as to the respondent as early as October 1987, and the letter gave no indication or notice whatsoever that the investigation of the incident would be continuing.

¹⁴At the same time, it is hard to escape the conclusion that whatever FAA may have privately or actually intended by this letter, it is obvious that its impact on respondent would have been such as to set his mind to rest. He had received first a letter telling him that his testing and certification were put on hold because of an investigation; he had testified before the grand jury at the FAA's request; he was then told that the restrictions were removed. Given this history, it should surprise no one that respondent might understand this upbeat, apologetic letter lifting all restrictions against him to be the last chapter in the matter.

act. Whether the individual charged with cheating will in fact be found not to possess the requisite care, judgment, and responsibility required of a certificate holder is a question reserved for resolution at a hearing.

In this case, we do not believe any presumption of a lack of qualification can fairly be said to have survived the May 1988 letter, whether or not that document signalled an end, for all purposes, to the review of respondent's accountability in the bogus exam controversy. We decline to hold or conclude that the Administrator would deliberately encourage an airman to "proceed with [his] certification and career" if he believed, based on information already known to him, that the airman could not be expected to exercise the privileges of any certificates then held or to be applied for in accordance with applicable requirements. Consistent with that view of the matter and the absence of any basis in the record for finding good cause for the Administrator's delay beyond six months in noticing charges against respondent that would not impugn his qualifications, we find that dismissal of the complaint for staleness was warranted.

¹⁵We intimate no view on the law judge's conclusion that the case against the respondent was initiated out of political pressure.

ACCORDINGLY, IT IS ORDERED THAT:

- 1. The Administrator's appeal is denied; and
- 2. The initial decision dismissing the Administrator's order is affirmed.

VOGT, Chairman, HALL, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.